In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2043

P. H. LEWIS, doing business as
AIRCO ENGINEERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, a government contractor, contends that the Court of Claims improperly granted summary judgment to the government in his Wunderlich Act suit contesting the government's termination of his contract, award of damages resulting from his default, and denial of his claim for extra costs.

Petitioner contracted with the Department of Agriculture to construct roads and a recreation area in the Apache National Forest in Arizona. In 1969, when it became apparent that petitioner would not complete the work within the time stipulated for performance, the Department terminated the contract for default, and entered into a reprocurement contract with another company (Pet. App. C-37 to C-46). The government contracting officer subsequently assessed costs of approximately $40,000 against petitioner for liquidated damages and the increased

costs of completion of the work following petitioner's default (Pet. App. C-2, C-50 to C-51). Petitioner then appealed to the Board of Contract Appeals of the Department of Agriculture, contesting the propriety of the default termination and the amount of costs assessed against it. In addition, petitioner claimed approximately $100,000 in damages against the government for alleged "extra" costs incurred by petitioner while engaged in the projects. The Board, after a full evidentiary hearing, affirmed the default termination and the award of costs against petitioner. The Board also upheld petitioner's claim for extra costs to the extent of an award of $9,625.10 (Pet. App. B-29).

Petitioner then brought this action in the Court of Claims under the Wunderlich Act, 41 U.S.C. 321-322, to review the Board's decision. After both sides moved for summary judgment, the trial judge, in a comprehensive and detailed opinion, recommended that the decision of the Board be sustained, concluding that substantial evidence supported its decision and that all of petitioner's claims were without merit (Pet. App. B-28 to B-29). The Court of Claims adopted the trial judge's decision, and accordingly dismissed petitioner's complaint (Pet. App. A-1 to A-2).

1. Although petitioner himself moved for summary judgment, he now contends that "[g]enuine issues of material fact precluded summary judgment" (Pet. 5) and that the grant of summary judgment by the Court of Claims denied him "a full and open hearing" (Pet. 8). The Wunderlich Act, however, provides that decisions of a government contract appeals board shall be final and conclusive unless fraudulent, capricious or arbitrary, made

in bad faith, or "not supported by substantial evidence." 41 U.S.C. 321. Thus, the sole function of the Court of Claims in a Wunderlich Act suit is to determine whether the administrative decision was in accordance with law and was supported by "substantial evidence" in the administrative record. The court properly performed this limited review function on cross-motions for summary judgment. See, *e.g.*, *National Broadcasting Company* v. *United States*, 319 U.S. 190, 227; 6 Moore, *Federal Practice*, par. 56.17[3] (1974 ed.). This Court has specifically held that review in a Wunderlich Act suit is limited to the administrative record and that a trial *de novo* in the Court of Claims is improper. *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709.

2. There is no merit in petitioner's argument (Pet. 4) that the administrative decision is not supported by substantial evidence. The evidence supporting the administrative decision is exhaustively set forth in the careful opinions of both the Board and the Court of Claims trial judge, upon which we rely (Pet. App. C-1 to C-51; B-1 to B-29). Further review by this Court of these factual findings is not warranted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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